

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF :

JAMES HENRY, JR.,
Complainant

and

MIDWAY BUILDING SERVICES, LTD.,
f/k/a BRILLIANTE BUILDING SERVICES,
INCORPORATED,
Respondent

CHARGE NO.: 2008CF2220
EEOC NO.: 21BA 81180
ALS NO.: 09-0095

RECOMMENDED ORDER AND DECISION

This matter comes before the Commission pursuant to an order of default entered against Respondent on March 18, 2009. A public hearing on damages was held on June 4, 2009 at which Respondent did not appear. No post hearing briefs were filed as Complainant chose to rest on the record compiled at the public hearing. This matter is now ready for decision.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

Statement of the Case

Complainant, James Henry, Jr., filed his Charge No. 2008CF2220 against Respondent, Midway Building Services, Ltd. f/k/a Brilliante Building Services, Incorporated, on February 20, 2008 with the Illinois Department of Human Rights. The charge alleges that Complainant was given unequal job assignments due to his race, Black; that Respondent failed to accommodate his physical handicap, a back disorder; that Respondent failed to accommodate his physical handicap, a left elbow disorder; that Respondent failed to accommodate his physical handicap, arthritis in both knees; and, that Respondent denied him health benefits and long term disability coverage due to his race, Black. In its petition for the entry of a default against Respondent, the

Department noted that it sent an initial notice to Respondent requiring it to submit its verified response to the charge within 60 days. No response was filed, even after the Department gave Respondent an extension of time to do so. Finally, Respondent was given a Notice to Show Cause why it did not submit a response. Respondent did not respond to the Notice and did not request a review of the Notice of Default sent to it on December 5, 2008. On February 25, 2009, the Department petitioned the Commission for an order of default against Respondent, which was granted on March 18, 2009. On April 28, 2009, the public hearing was scheduled for June 4, 2009. No one appeared on behalf of Respondent at the status hearing or for the public hearing, which was held as scheduled on June 4, 2009 with only Complainant present.

Findings of Fact

1. Complainant, James Henry, Jr., filed his Charge No. 2008CF2220 with the Illinois Department of Human Rights on February 20, 2008, alleging that Respondent, Midway Building Services, Ltd., f/k/a Brilliante Building Services, Incorporated, gave Complainant unequal job assignments due to his race, Black; that Respondent failed to accommodate his physical handicap, a back disorder; that Respondent failed to accommodate his physical handicap, a left elbow disorder; that Respondent failed to accommodate his physical handicap, arthritis in both knees; and, that Respondent denied him health benefits and long term disability coverage due to his race, Black.
2. Although Respondent received adequate notice of the requirement to submit a verified response to the charge, as well as an extension of time, it did not do so. Subsequently, the Department's Petition for Hearing to Determine Damages was filed with the Commission on February 25, 2009 and the Commission's Order of Default requesting that the Administrative Law Section schedule such a hearing was issued on March 18, 2009. The public hearing on damages was subsequently scheduled for June 4, 2009.

3. Only Complainant appeared for the public hearing on June 4, 2009. Respondent did not appear at or participate in the public hearing. No attorney representing Respondent has ever filed an appearance and Respondent did not participate in the post-hearing briefing of this matter.
4. Complainant's charge alleges that he was the subject of discrimination by Respondent due to his race and handicap during the period of August, 2007 through February, 2008. Respondent did not participate in the investigation of Complainant's charge, to include his subsequent termination from employment on October 31, 2008. The termination would have been relevant to the original charge and, absent Respondent's lack of cooperation and subsequent default, could have been included in the Department's investigation of the matter.
5. Testimony presented at the public hearing indicates that Complainant was earning \$9.40 per hour at the time of his termination and was working 30 hours per week. At the time of the public hearing in June, 2009, Complainant was unable to work. Therefore, his period of back pay is November, 2008 to June, 2009, or 31 weeks at \$282.00 per week. Complainant is entitled to \$8,742.00 in back pay.
6. Complainant also testified to the emotional impact the discriminatory conduct and termination had on him. He is entitled to an award of \$10,000.00 for emotional distress.

Conclusions of Law

1. Complainant is an "aggrieved party," and Respondent is an "employer" as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/1-103(B) and 775 ILCS 5/2-101(B)(c).
2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. In accord with the default order entered on March 18, 2009, Respondent is liable for a violation of the provisions of the Illinois Human Rights Act that prohibit discrimination in employment based on race and handicap as alleged in this Charge.
4. Based on the default of Respondent and its failure to effectively dispute or oppose any of the requests made by Complainant with regard to an award for back pay and emotional distress, Complainant is entitled to an award for each of these elements of loss in order to be made whole. The details of the award are listed at the end of this recommended order and decision, and are incorporated in this finding.
5. The uncontroverted evidence of discrimination based on race and handicap presented by Complainant in his Charge and at the public hearing indicates that the management of Respondent is in need of training as specified in the recommendations below in order to prevent a recurrence of the discriminatory conduct alleged in this case.

Discussion

Default

In its Petition of February 25, 2009, the Department of Human Rights indicated that Respondent "failed to file a proper verified response (to Complainant's charge), has not shown good cause for (its) failure to do so, and has not filed a timely Request for Review of the ... Notice of Default," At that time, this matter was forwarded to the Commission for the purpose of entering an order of default and setting a public hearing on damages. The Commission's Order of Default was entered on March 18, 2009. The result of a respondent's default is the determination that the respondent is liable for the discriminatory conduct alleged by the complainant in the charge brought before the Department. The Commission is only able

to receive evidence of the damages suffered by the complainant and it is not relevant to receive any evidence regarding the substance of the discriminatory conduct alleged in the charge.

In this case, the Respondent not only chose to ignore the process available to it at the Department, it also did not participate at the public hearing on damages even after being provided due notice. In the post-hearing order issued on June 16, 2009, the parties were advised that Respondent could still participate in this matter by submitting a post-hearing brief if it submitted a notice of intent to participate (along with an appearance of an attorney). Respondent did not file any post-hearing brief and no attorney has ever filed an appearance on its behalf.

It should be noted that the charge does not include an explicit allegation of an unlawful discharge or constructive discharge. This is because Complainant's termination of employment occurred in October, 2008, about eight months after the charge was filed with the Department. In the normal course of investigation and consideration of a charge, the Department could easily have incorporated additional allegations regarding the discharge. However, the conduct of Respondent itself prevented the Department from investigating the full range of allegations against Respondent, which could have included either or both retaliatory and discriminatory discharge. By virtue of Respondent's failure to submit a verified response to the charge, the Department was unable to mount a full investigation. The case was diverted for consideration of the entry of a finding of default and there was no opportunity for Complainant to have all of his issues considered.

This truncation of the investigative process was not caused by Complainant and it is Respondent who must bear the burden of the negative consequences, such as the inclusion of damages for the discharge of Complainant. The Commission long ago found that "an allegation (of discharge) may be made in an amended complaint, even though an amended charge was never filed." Bonner and AT&T, IHRC, ALS No. 5682, October 2, 1996. In the present matter,

Complainant never had the opportunity to amend either his charge or a complaint because Respondent did not defend against the charge and, consequently, no complaint could be filed.

Complainant therefore was permitted to present evidence regarding the damages he suffered due to his discharge consisting of back pay and emotional distress. The amounts of these damages are discussed below.

Damages

Back Pay -- The first element of damages to be considered is Complainant's request for back pay. Complainant was discharged from his employment on or about October 31, 2008. In the period of time prior to October 31, 2008, Complainant was working about 30 hours per week. At the time of the public hearing, Complainant testified that he was no longer able to work. Tr. 10. Therefore, his claim for back pay comprises the approximately 31 weeks between October 31, 2008 and June 4, 2009. He testified that at the time of the discharge he was receiving \$9.40 per hour. His gross income was \$282.00 per week and his gross pay for 31 weeks is \$8,742.00. Complainant is entitled to back pay in the amount of **\$8,742.00**.

Emotional Distress -- Complainant has requested \$750,000.00 as compensation for the emotional distress he suffered due to the emotional impact of the discriminatory conduct of Respondent and of his discharge. It has long been established that the Commission's statutory authority to award a prevailing complainant his or her actual damages includes the ability to award monetary damages for emotional distress. Village of Bellwood v. Illinois Human Rights Comm'n, 184 Ill.App.3d 339, 355, 541 N.E.2d 1248, 133 Ill.Dec. 810 (1st Dist. 1989). In this case, Complainant testified that the experience with Respondent "just took me down, and it took everything away from me" and that he was "very depressed, very depressed." Tr. 17. Complainant's testimony and his demeanor while giving this testimony indicated that the discriminatory actions of Respondent had a profound effect on him.

The degree of the distress experienced by Complainant was over and above that which would be expected from "the mere fact of a civil rights violation" and is therefore compensable

under the Human Rights Act. Harris and Vinylgrain Industries of Illinois, IHRC, ALS No. 11382, August 1, 2001. However, even in the context of a default, Complainant's request for an award of \$750,000.00 far exceeds the awards typically made by the Commission and approved by the Appellate Court. Under the circumstances demonstrated in the record, an appropriate award for emotional distress in this case is \$10,000.00. Therefore, an award of **\$10,000.00** for the emotional distress of Complainant will be recommended.

Medical Insurance and Medical Expenses -- Complainant has also charged that Respondent denied him medical insurance when it did not do so to other workers. However, in his testimony, Complainant indicated that this allegation was based on the deduction of taxes for Medicare from his salary with no commensurate provision of medical insurance by Respondent. Tr. 21. The Medicare tax is, of course, paid to the federal government by every employed person and does not entitle the employee to present day medical coverage. Complainant further stated that other people doing the same or similar work for Respondent also did not receive medical coverage, although he attributed this primarily to the (unsubstantiated) assertion that "most of them were illegal immigrants." Tr. 22. The evidence provided by Complainant indicates that medical insurance was not a benefit generally made available to workers similarly situated to Complainant. Given this circumstance, it is not possible to award Complainant any compensation for the lack of medical insurance provided by Respondent or for any out of pocket medical expenses he incurred during his employment or after his discharge.

Training -- The evidence in this case indicates that Respondent would benefit from training to prevent a recurrence of the conduct directed at Complainant due to his race and handicaps. Therefore, it is recommended that the employees of Respondent be required to undergo training as prescribed by the Illinois Department of Human Rights to prevent a recurrence of the unlawful activity found in this case.

* * *

Other elements of the award, as permitted by the cited sections of the Act and the Commission's procedural rules, or otherwise not requiring additional analysis, are specified in the recommendation summary below

Recommendation

It is recommended that the default entered against Respondent be affirmed and that Respondent be held liable for a violation of the prohibition in the Human Rights Act against discrimination in employment due to the race and disability of the employee. It is further recommended that Respondent be found liable for an award under the Illinois Human Rights Act and that Complainant be awarded the following relief:

- A. That Respondent is to pay Complainant back pay in the amount of \$8,742.00 for the period of October 31, 2008 through June 4, 2009;
- B. That Respondent is to pay Complainant prejudgment interest on the back pay awarded above as contemplated by Section 8A-104(J) of the Human Rights Act (735 ILCS 5/8A-104(J)) and calculated as provided in Section 5300.1145 of the Commission's Procedural Rules, to accrue until payment in full is made by Respondent;
- C. That Respondent pay to Complainant the amount of \$10,000.00 for the emotional distress suffered by Complainant as a result of the unlawful discrimination against him by Respondent;
- D. That Respondent cease and desist from any discriminatory actions with regard to any of its employees and that Respondent, its managers, supervisors and employees be referred to the Illinois Department of Human Rights Training Institute (or any similar program specified by the Department) to receive such training as is

necessary to prevent future civil rights violations, with all expenses for such training to be borne by Respondent; and,

- E. That Complainant's personnel file or any other file kept by Respondent concerning Complainant be purged of any reference to this discrimination charge and this litigation.

HUMAN RIGHTS COMMISSION

ENTERED:

BY:



DAVID J. BRENT

ADMINISTRATIVE LAW JUDGE

ADMINISTRATIVE LAW SECTION

February 18, 2011